As a general rule a lessee who, being in breach of a covenant, seeks relief against forfeiture, is required to pay the costs occasioned by his application. In the present case it was not necessary for the Federal Court to consider whether it should adhere to the ordinary rule because that Court, having decided that the case was a proper one for the grant of relief, nevertheless went on to hold that no breach of covenant had been made out. Since their Lordships have formed a different opinion on that point it is necessary to consider what order ought to be made in respect of the costs of the trial and in their Lordships' opinion these should be paid by the respondents. However their Lordships would affirm the order of the Federal Court that the respondents should have the costs of the appeal to that Court.

Their Lordships will therefore advise the Head of Malaysia that the appeal should be dismissed but that the order of the Federal Court of Malaysia (Appellate Jurisdiction) should be varied by deleting the words —

"the respondents do pay to the appellants the costs of this appeal and in the court below"

and by substituting therefor the words —

"the appellants do pay to the respondents the costs in the court below and the respondents do pay to the appellants the costs of this appeal."

Their Lordships will further advise that the appellants should pay the respondents' costs of the appeal to their Lordships' Board.

Appeal dismissed.

Solicitors: *Coward Chance* (for *Shook Lin & Bok*); *Sole, Solebridge & Co.* (for *Sharikat Kam Woon Wah*).

MALAYSIAN REPORTS

T.O. THOMAS v. K.C.I. REDDY & ANOR.

[F.C. (Azmi L.P., Lee Hun Hoe C.J. (Borneo) and Gill C.J. (Malaya) May 31, 1974]

[Kuching — Federal Court Civil Appeal No. 83 of 1973]

Practice and Procedure — Order made by Judge in Court confirming, setting aside or varying order made in Chambers after hearing further argument — Whether appeal from such order requires leave — R.S.C. 1957, O. 54 r. 22A — Courts of Judicature Act, 1964, s. 68(2).

In this case the appellant had filed a suit for libel against the respondents. The first respondent applied for production of a letter written by the second respondent to the appellant but this was resisted by the appellant on the ground that the document was a privileged communication. On application to the judge in chambers, the learned judge made an order in terms of the application. The appellant requested the learned judge to have the matter argued further in open court. This was done and after hearing arguments and an adjournment for consideration the learned judge confirmed the order which he had made in chambers. The appellant appealed to the Federal Court but the first respondent applied for the appeal to be dismissed on the ground that no leave had been obtained from the judge or the Federal Court in compliance with section 68(2) of the Courts of Judicature Act, 1964.

Held: Azmi L.P. and Gill C.J., Lee Hun Hoe C.J. dissenting: the order made by the learned judge although an interlocutory order was made by him in court and not in chambers and therefore no leave was required for appeal against the order.

Cases referred to:-

(1) *Nagappa Rengasamy Pillai* v. *Lim Lee Chong* [1968] 2 M.L.J. 91.

(2) *Forrester* v. *Jones* [1899] W.N. 78.

(3) *Sri Jaya Transport Co Ltd.* v. *Fernandez* [1970] 1 M.L.J. 87.

(4) *Magor and St Mellons Rural District Council* v. *Newport Corporation* [1952] A.C. 189 p. 191.

FEDERAL COURT.

Appellant in person.

Denis Ong for the first respondent.

Fong Joo Chung for the second respondent.

Azmi L.P.: The plaintiff filed a suit against the first defendant for libel alleged to be contained in a letter sent by the latter to him which reads as follows: —

"The allegation contained in your letter is mischievous and without any basis. As an officer of court I expected your firm to exercise caution and sobriety before giving currency to the idea communicated in your letter. Far from being so, you have merely acted as a conduit pipe and a purveyor of falsehood."

A carbon copy of the letter was sent to the Deputy Public Prosecutor, Kuching.

It would appear from the pleadings that this letter was sent by the first defendant in reply to a letter previously sent by the plaintiff to him. The relevant part of the plaintiff's letter reads as follows: —

"..... Our client says that the case against him is scheduled for hearing, commencing the 26th instant, in the court presided over by you. And he further says that a high official in the Government of Sarawak told him of a casual conversation you had with that official about this case. From what he so heard it appears to our client that you are likely to have preconceived ideas about him and therefore you will not be able to hear the case against him with an unbiased mind."

The first defendant averred that the above was also libellous of him as alleged in his counterclaim against the plaintiff and his client (named as second defendant).

The information referred to in the plaintiff's letter was alleged to have been conveyed in a letter written by the second defendant to the plaintiff. This letter is the subject matter of the present application. The first defendant applied for its production for his inspection. This was resisted by the plaintiff on the ground that the document was a privileged communication.

The judge heard the application in chambers and made an order in terms of the application of the first defendant. The plaintiff requested the learned judge to have the matter argued further in open court. This was done and after hearing prolonged arguments and an adjournment for consideration, the learned judge affirmed the order which he had made in chambers.

The plaintiff appealed against this order to this court. At the outset of the hearing the first defendant by notice of motion applied that the appeal be dismissed upon the ground that it was incompetently brought as no leave had been obtained from the judge or the Federal Court in compliance with the provisions of section 68(2) of the Courts of Judicature Act 1964. Section 68(2) of the Act reads as follows: —

"No appeal shall lie from an interlocutory order made by a judge of the High Court in chambers unless the judge has certified, after application, within four days after the making of such order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Federal Court or from a judge of the High Court."

Mr. Denis Ong for the first defendant cited the judgment of this court in *Nagappa Rengasamy Pillai* v. *Lim Lee Chong*.[1] In that case the plaintiff claimed a sum of money due on a dishonoured cheque and the defence was that the cheque was only given as a security. The Senior Assistant Registrar gave the defendant unconditional leave to defend. The matter was reheard by the judge in chambers and the learned judge gave leave to defend conditional upon a deposit of the amount claimed into court. The matter was subsequently adjourned for further argument in court on the application of the defendant. After hearing further arguments the order made in chambers was affirmed. The defendant appealed to the Federal Court. Leave to appeal had not been obtained from the judge of the High Court or the Federal Court. Ong Hock Thye F.J. (as he then was) in that case held that as no leave had been obtained from the judge of the High Court or the Federal Court the appeal was incompetent and must therefore be dismissed. The other two members of the court including myself concurred with the judgment.

In his judgment Ong Hock Thye F.J. said this: —

"As further argument in court did take place, the first limb of sub-section (2) clearly has no application. That leaves only the second limb, which means, again clearly, that 'no appeal shall lie from an interlocutory order ..... unless leave is obtained from the Federal Court.' The dichotomy in sub-section (2) is complete and leaves no room for any suggestion that anywhere else in the Act, there are other provisions, perhaps in general terms, which in effect permit a trichotomous interpretation of this subsection."

In the instant case it was argued on behalf of the plaintiff that, since the matter had been further argued in open court, no further leave of the High Court or the Federal Court would be necessary. It would be apparent from the judgment of Ong Hock Thye F.J. that further leave would appear necessary because the appeal was an appeal against an interlocutory order.

Let us refer to the corresponding provisions in the English rules dealing with appeals from a Judge in Chambers. They are to be found in O.54 r.23(2) (in the Probate, Divorce and Admiralty Division) and O.55 r.14D (in the Chancery Division). These provisions apply to decision, order or judgment made by a Judge in Chambers but as stated in the rule without prejudice to section 31 of the English Supreme Court of Judicature Act 1925.

Under these rules an unsuccessful litigant before a Judge in Chambers has two alternatives: —

(1) to obtain leave to appeal from the judge or from the Court of Appeal, or

(2) to move before the Judge in Court to set aside or discharge the decision, order or judgment.

Forrester v. *Jones*[2] however, rules that if either party does not intend to accept the decision of the Judge in Chambers as final the proper course is to ask at once to have the matter adjourned into court for argument. It might be noted here that a distinction should be made from the case where the judge adjourns a hearing in chambers into court under Order 54 r.9 and the adjournment into court is merely a continuance of the hearing in chambers. As I have stated previously, these rules must be read without prejudice to the provision of section 31 of the Supreme Court of Judicature Act 1925. The relevant paragraphs are paragraphs (g) and (i) of that section.

Paragraph (g) would appear to be the basis of Order 54 r.23(2) and Order 55 r.14D which would require leave for an appeal against an order made by a Judge in Chambers where no application to set aside the order has been made.

Paragraph (i) refers to an interlocutory order or judgment which requires leave except in some special instances enumerated therein. It would therefore seem apparent from the English provisions that an appeal against an order made in Chambers will not require leave to appeal if application to set aside or discharge the order has been made but refused and that an appeal against an interlocutory order will always require leave where no application to set aside or discharge the order has been made.

Let me now turn to the provisions of section 68(2) of our Courts of Judicature Act. It is clear from these provisions that an appeal will lie as a matter of right if the judge who made the order in Chambers certified that he wished to hear no further arguments, so that if a party failed to get that certificate he would have to obtain leave. The provisions make it clear that these two conditions are in the alternative.

It was urged on behalf of the first defendant, however, that if the judge instead of issuing the certificate that he requires no further argument, hears an ap-

plication in open court, then an appeal against his order in such circumstances would still require leave. In my view, however, that conclusion makes no sense. I always maintain and hold the view that where the judge complies with the request for further argument in court and adjourns the summons into court for further argument, any order he makes would be an order made in court and not an order made in Chambers. Therefore an appeal against such order is by right.

I appreciate that it is the practice in England and has always been the practice here that an appeal against an interlocutory order requires leave. That rule is a very sensible and necessary rule. So it is not without much reluctance that I come to the conclusion that in this instant case no further leave is required. I would therefore dismiss the first defendant's objection. In my humble view an amendment to section 68(2) of the Courts of Judicature Act is clearly indicated.

Lee Hun Hoe C.J. (Borneo): I have the advantage of reading the judgment of the Honourable the Lord President. I regret I am unable to agree with the Honourable the Lord President in this matter.

By a Notice of Motion the first respondent moved the court to dismiss an appeal on the ground that it was incompetent as no leave was obtained from either this court or a judge of the High Court in compliance with the provisions of section 68(2) of the Courts of Judicature Act, 1964 which reads —

"No appeal shall lie from an interlocutory order made by a judge of a High Court in chambers unless the judge has certified, after application, within four days after the making of such order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Federal Court or from a judge of the High Court."

On 26th June, 1972, an application by way of summons in chambers by first respondent for an order for inspection of certain documents came up for hearing before the learned judge. This summons was supported by an affidavit which was objected to by appellant as being defective. As a result, the learned judge ordered that a fresh affidavit be filed. This was done and the matter came up for hearing on 7th August, 1972. At the hearing objection was taken by appellant on the ground that the application was misconceived. However, the learned judge granted the application and made an order in terms. Being dissatisfied, the appellant applied, pursuant to Order 55 r.22A read in conjunction with section 68(2) of the Courts of Judicature Act, 1964, for the matter to be adjourned to open court for further argument. This was acceded to by the learned judge who heard further argument on 30th September, 1972. At appellant's request the hearing was adjourned until 14th October, 1972. It was not until 18th June, 1973 that the learned Judge delivered his ruling confirming the order made earlier in chambers. Appellant appealed against the ruling. First respondent then filed the said Notice of Motion.

It is not in dispute that the appellant has not obtained leave to appeal either from this court or a judge of the High Court. First respondent contended that leave was necessary. In support he referred to the decision of this court in *Nagappa Rengasamy Pillai* v. *Lim Lee Chong*.[1] In that case the Senior Assistant Registrar gave appellant unconditional leave to defend. Upon appeal to the judge in chambers, leave was made conditional upon deposit of amount claimed into court. On the application of the appellant the matter was adjourned to open court for further argument. After hearing argument the order made in chambers was confirmed. Appellant thereupon appealed to this court without having first obtaining leave to appeal either from this court or a judge of the High Court. It was held that as no leave had been obtained either from this court or a judge of the High Court, the appeal was incompetent and must be dismissed. In his judgment, H. T. Ong F.J., as he then was, after referring to section 68(2) of the Courts of Judicature Act, 1964, made these observations —

"As further argument in court did take place the first limb of subsection (2) clearly has no application. That leaves only the second limb, which means, again clearly, that 'no appeal shall lie from an interlocutory order ..... unless leave is obtained from the Federal Court or from a judge of the High Court.' The dichotomy on subsection (2) is complete and leaves no room for any suggestion that anywhere else in the Act, there are other provisions, perhaps in general terms, which in effect permit a trichotomous interpretation of this subsection."

Reference was also made to the case of *Sri Jaya Transport Co. Ltd.* v. *Fernandez*.[3] There no application was made for further argument but a certificate obtained from the learned judge that he required no further argument. As Ali F.J. observed at page 88 that he was in no doubt that "rule 22 has been applied in this case by the learned judge so that it was no longer necessary for applicants to resort to rule 22A." What the applicants should have done was to apply for leave to appeal under the provisions of section 68(2) of the Courts of Judicature Act, 1964 instead of applying for special leave to appeal out of time under rule 13 of the Federal Court (Civil Appeals) (Transitional) Rules 1963. I do not think *Sri Jaya Transport's* case is of much assistance on the point before this court.

Mr. T. O. Thomas appearing in person submitted that where a matter was adjourned into open court on the application of the party who was dissatisfied with an order made in chambers and the court adjourned the matter into open court for further argument and made an order confirming the previous order or varying the previous order, no leave was necessary. Where a judge in chambers directs any summons to be heard in open court under Order 54 r.22 any decision on such summons shall be deemed a decision made in chambers. However, he submitted that an order made under Order 54 r.22 was quite different from an order made in open court under Order 54 r.22A. In other words, where a judge decides to hear further argument in open court and makes an order, no leave to appeal is necessary. It is an order made in open court. Unlike Order 54 r.22 there is nothing under Order 54 r.22A to say that such a decision is deemed to be a decision made in chambers.

Although the argument is ingenious, I do not agree with it. The discretion whether to hear further argument or not under Order 54 r.22A rests with the judge. If he decides not to hear further argument he may issue a certificate to that effect as in *Sri Jaya Transport's* case.

It would seem that leave would be required if the judge refuses to hear further argument or issue such a certificate. Any order made by a judge on the application of a dissatisfied party under Order 54 r.22A must relate back to the summons in chambers, so that if he makes an order after hearing further argument under Order 54 r.22A it could be argued that that decision shall be deemed to be a decision made in chambers as envisaged by Order 54 r.22. In other words, the two rules should be read together in conjunction with section 68(2) of the Courts of Judicature Act, 1964 in such a situation to make any sense. Further, the fallacy of Mr. Thomas's argument is that the order, although made in open court, is still an interlocutory order. It is, therefore, an appeal against an order made in chambers, in which case section 68(2) of the said Act applies.

Order 54 r.22A is local and comes into play only after a decision has been made by a judge in chambers. This is so even if a judge adjourns the matter to open court under Order 54 r.22. The application for further argument is merely to provide a judge with an opportunity to reconsider the order he makes in chambers. If he has heard full argument on the matter under Order 54 r.22 as in *Sri Jaya Transport's* case, he would normally, as he did in that case, issue a certificate that he required no further argument. That certificate in effect tantamounts to granting leave to appeal to the Federal Court. Now, if he should hear further argument as in this case and in *Nagappa Rengasamy Pillai's* case he would either set aside his previous order or make such order as he thought fit. In which case it is necessary for the party who is dissatisfied to obtain leave to appeal, either from this court or from a judge of the High Court.

If I understand Mr. Thomas correctly, his point is that this is an interlocutory order made in open court, therefore no leave is necessary as section 68(2) of the said Act applies to an interlocutory order made in chambers. He referred to Order 54 r.23(2) of the 1958 and Order 58 r.7(2) of the 1973 White Book where no leave would be necessary to appeal to the Court of Appeal after an application to set aside or discharge an order has been made to and refused by a judge. These two rules are substantially the same.

Under Order 58 r.7(2) of the 1973 White Book, it is provided that subject to section 31 of the English Judicature Act, 1925 and section 15(2) of the Administration of Justice Act, 1960 and without prejudice to section 13 of the said Act of 1960, the position is that in the Chancery Division and the Family Division, an appeal shall lie to the Court of Appeal from a judgment, order or decision of a judge in chambers either —

(a) with the leave of the judge or the Court of Appeal; or

(b) after an application to set aside or discharge the judgment, order or decision has been made to the judge sitting in court and has been refused.

The effect is that a dissatisfied party before a judge in chambers has two alternatives —

(1) To appeal to the Court of Appeal with leave of the judge or Court of Appeal; or

(2) To apply to the judge in court to set aside or discharge the judgment, order or decision and if such application is refused to appeal to the Court of Appeal without leave.

I cannot find such clear provisions anywhere in the Rules of the Supreme Court or in the Courts of Judicature Act, 1964. It may be that the Rules or the Act need to be amended. But, until it is amended, the case must be decided according to the law as it stands. *Craies* on Statute Law, 6th Edition, page 71 states —

"In other words, the language of Acts of Parliament, and more especially of modern Acts must neither be extended beyond its natural and proper limits, in order to supply omissions or defects, nor strained to meet the justice of an individual case."

Thus Lord Simonds observed in *Magor and St. Mellons Rural District Council* v. *Newport Corporation*[4] that —

"The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited:".

In construing a statute the duty of the court is limited to interpreting the words used by the legislature. The court should not try to fill in any gap disclosed. If there is any gap the remedy lies in amending the statute. I think the practice here is for leave to be obtained in an appeal against an interlocutory order. The Honourable the Lord President has also confirmed this. He also remarked that the rule was necessary and sensible. Suffian F.J., as he then was, in *Sri Jaya Transport's* case at page 87 observed that —

"The order sought to be appealed against is an interlocutory order. As it happened, it was not made in chambers, but in open court under order 54 rule 22, and it has been held by this court in *Nagappa Rengasamy Pillai* v. *Lim Lee Chong* that notwithstanding the proviso to order 54 rule 22, in these circumstances the first limb of subsection (2) of section 68 of the Courts of Judicature Act, 1964, does not apply, so that no appeal lies unless leave is obtained from this court or from a judge of the High Court."

Unless it can be shown that the decision on the point in *Nagappa Rengasamy Pillai's* case was made *per incuriam* the motion must succeed. For the reasons given, I would dismiss this appeal with costs.

Gill C.J. (Malaya): The question for determination on this notice of motion by the first respondent to this appeal is whether leave is required to appeal from an order made by a Judge in Court, confirming or setting aside or varying as he thinks fit an order which he has previously made in Chambers, after hearing further arguments on an adjournment of the matter into court under Order 54, rule 22A of the Rules of the Supreme Court, 1957. The rule in question reads as follows:

"Any party dissatisfied with any order made by a judge in chambers may apply, at the time the order is made, orally, or at any time within four days from the day of the order in writing to the Registrar, for the adjournment of the matter into court for further argument; and on such application, the judge may either adjourn the matter into court and hear further argument, or may certify in writing that he requires no further argument. If the judge hears further argument he may set aside the order previously made, and make such other order as he thinks fit."

The relevant provision as regards leave to appeal is contained in subsection (2) of section 68 of the Courts of Judicature Act, 1964 which reads as follows:

"No appeal shall lie from an interlocutory order made by a judge of the High Court in chambers unless the judge has certified, after application, within four days after the making of such order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Federal Court or from a judge of the High Court."

The same question as in this case arose in the case of *Nagappa Rengasamy Pillai* v. *Lim Lee Chong*[1] on an objection taken in limine by the respondent in that case as to the competency of the appellant to bring the appeal without leave either of the judge of High Court, against whose judgment the appeal was raised, or of the Federal Court. This court in that case upheld the objection, thus answering the question in the affirmative, and dismissed the appeal. In stating in his judgment the reason for the answer, with which the other members of the court agreed, Ong Hock Thye F.J. speaking of subsection (2) of section 68 of the Act said:

"As further argument in court did take place, the first limb of subsection (2) clearly has no application. That leaves only the second limb, which means, again clearly, that 'no appeal shall lie from an interlocutory order ... unless leave is obtained from the Federal Court or from a judge of the High Court.' The dichotomy in subsection (2) is complete and leaves no room for any suggestion that anywhere else in the Act, there are other provisions, perhaps in general terms, which in effect permit a trichotomous interpretation of this subsection."

It would seem clear from the judgment that the above case was decided solely on the interpretation of subsection (2) of section 68 of the Act. Although the order appealed from in that case, as in the instant case, was an order made in court affirming an order which had been previously made in Chambers, there is no mention in the judgment of rule 22A under which the matter was adjourned for further argument on the application of the defendant. Needless to say, that application by the defendant could only have been made under rule 22A. It is stated in the judgment that the order appealed against was manifestly an interlocutory order for the simple reason that it was not a final judgment. Notwithstanding the omission of the words "in Chambers" after the words "interlocutory order", the order appealed against was assumed to be an interlocutory order in Chambers. In my judgment there was no basis for that assumption because the only provision in the rules under which any decision in court on any summons, appeal or application shall be deemed to be a decision at Chambers is contained in rule 22 of Order 54 which reads as follows:

"The judge in chambers if he thinks it desirable that any summons, appeal or application owing to its importance or the length of the time likely to be occupied or for any other reason should be heard in court may direct that the same be so heard or may adjourn the same to be so heard. Provided that any decision in court on any such summons, appeal or application shall be deemed to be a decision at chambers."

I would pause here to reiterate that a Judge in Chambers may adjourn the matter before him into court either under rule 22A for further argument on the application of any party dissatisfied with any order which he has already made in Chambers, or under rule 22 of his own motion as a matter of convenience or expediency before he has made any order on the application before him in Chambers. In other words, in the former case the matter is adjourned into court to review the order which has already been made on the application in Chambers, whereas in the latter case it is for the hearing of the application in Chambers itself that the matter is adjourned into court where the judge considers it desirable to do so under the provisions of rule 22. It is therefore not surprising that the order made in court in this latter case is deemed to be an order made in Chambers.

The object of an application under rule 22A for an adjournment of the matter into court is clearly to give the judge an opportunity to reconsider the order which he has previously made in Chambers. The order made in court in such circumstances would be a distinct and separate order even though it may affirm the order made in Chambers. Order 54, rule 6 provides that there can be no reconsideration in Chambers, except when the order has been made *ex parte* and the failure of the opposite party to attend was not due to wilful delay or negligence on his part. Needless to say, no question of reconsideration arises when the judge of his own motion adjourns into court under Order 54, rule 22 the hearing of an application before him in Chambers. Perhaps I should add that rule 22A does not provide for an order made in court thereunder to be deemed to be an order in Chambers.

It is to be observed that on an application made to him under Order 54, rule 22A by any party dissatisfied with any order which he has previously made in Chambers, the judge has two courses open to him. He may either adjourn the matter into court and hear further argument, or he may certify in writing that he requires no further argument. If he adopts the latter course and issues a certificate, there is a right of appeal without leave by reason of the specific provision to that effect in subsection (2) of section 68 of the Act, so that to that extent the provisions of Order 54, rule 22A and subsection (2) of section 68 of the Act are inter-related. Subsection (2), however, does not contain a specific provision to allow an appeal as of right (*i.e.* without leave) in the case of an order made in court after hearing further argument under the first limb of rule 22A. It was obviously for this reason that this Court in *Nagappa Rengasamy Pillai* v. *Lim Lee Chong*[1] ruled that the dichotomy in subsection (2) was complete and left no room for any suggestion that anywhere else in the Act there were other provisions, perhaps in general terms, which in effect permitted a trichotomous interpretation of this subsection. The result would appear to be that no leave is required where the judge certifies that he requires no further argument but that leave is required where he hears further argument in court and proceeds to make an order. In my humble opinion this does not make sense. At any rate, it makes complete nonsence of rule 22A which, as I have said, must be read in conjunction with subsection (2) of section 68 of the Act.

As I have already said, the decision of this court in *Nagappa Rengasamy Pillai's* case was made on the assumption that the order made in court on reconsideration of the matter must be deemed to be an order in Chambers. Again to repeat what I have said, there can be no ground for such assumption, bearing in mind that the provision of rule 22A is a distinct and separate provision from that of rule 22. An order made in court on reconsideration of the matter, even though it may confirm the order previously made in Chambers, must be treated as a separate and distinct order from that made in Chambers. It would be an order made in court on the application of any person dissatisfied with the order made in Chambers. To apply to the judge to adjourn the matter into court for further argument is no different from the provision in the English Rules to move before the Judge in Court to set aside or discharge the decision, order or judgment made in Chambers. And an order on a Motion before the Judge in Court in a pending action would be an interlocutory order in court and not an interlocutory order in Chambers, so that subsection (2) of section 68 of the Act would have no application to it.

It was said in *Nagappa Rengasamy Pillai's* case by this court that the English authorities have no application to this matter by reason of the special provisions of section 31 of the Supreme Court of Judicature (Consolidation) Act, 1925. I agree with that statement but only to the extent that there is no provision in the English rules which is in *pari materia* with our Order 54, rule 22A. However, the corresponding provisions in the English rules dealing with appeals from a Judge in Chambers are substantially the same as under our rules. As has been pointed out by the learned Lord President in his judgment which has just been delivered, under the English rules an appeal lies to the Court of Appeal from any decision or judgment of a Judge in Chambers either with the leave of the judge or the Court of Appeal; or after an application to set aside or discharge the decision, order or judgment has been made to the judge sitting in court and has been refused. Thus no leave to appeal is required under the second alternative. The position under our rules, in my considered opinion, is exactly the same.

Reading subsection (2) of section 68 of the Act in conjunction with rule 22A, it would seem clear that leave to appeal is not required either if the judge issues a certificate that he requires no further argument or hears arguments in court and proceeds to make an order. The absurdity of the argument that leave is required even after a judge has made an order in court on reconsidering the matter after hearing further arguments lies in the fact that such reconsideration would thus not be considered even on par with a mere certificate that no further arguments are required for the purpose of such reconsideration.

For the reasons I have stated, I would venture to hold with all humility that *Nagappa Rengasamy Pillai's* case was wrongly decided. As the matter was not fully argued and the decision rested solely on the interpretation of subsection (2) of section 68 of the Act without regard being had to the provisions of Order 54, rule 22A of the Rules of the Supreme Court, 1957, it must be regarded as having been made per incuriam. I would therefore dismiss the first defendant's motion with costs.

Order accordingly.

SRI JAYA TRANSPORT CO. (P.T.M.) BHD. v. ANG CHAI HAI & ORS.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ong Hock Sim F.J.) May 31, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 134 of 1973]

Negligence — Collision between motor car and bus admitted to be due to negligence of bus driver — Driver of motor car killed in accident — Death due to extensive burns when car caught fire after collision with bus — Presence of tins containing petrol in boot of car — Submission that death of deceased was neither caused by nor the direct consequence of collision — Remoteness of damage — Intervening act — Plea of contributory negligence.

Practice and Procedure — Pleadings — Amendment.

This was an appeal against the judgment of the High Court ([1974] 1 M.L.J. 87). The deceased died in a motor accident when the motor car driven by him collided with a bus driven by a servant of the appellants. The dependants of the deceased brought a claim for damages. At the trial it was conceded that the collision between the two vehicles was due entirely to the negligence of the bus driver. It was however argued that the appellants were not liable for damages on the ground that the death of the deceased was neither caused by nor the direct cause of the collision. It was common ground that the deceased died of extensive burns when his car caught fire on collision with the bus and that at the time of the accident the deceased had inside and in the boot of the car a total of eleven four-gallon tins containing petrol. The learned trial judge entered judgment for the dependants of the deceased and the appellants appealed. On appeal the appellants relied largely on the chemist's "opinion that the fire was most probably caused by a spark igniting the petrol that was being carried in the deceased's car as a result of which he was burnt to death" as such evidence was not challenged and was the opinion of an expert. It was further argued that the carrying of tins of petrol, some not closed, in the car was evidence of contributory negligence.

Held, dismissing the appeal: (1) if reliance was to be placed solely on the chemist's report, there should have been an application to amend the pleadings;

(2) the learned trial judge was correct in holding that the presence of the tins or cans of petrol was not the cause of the fire and that the fire could not have been started by the petrol in the tins being ignited;

(3) as negligence was admitted in this case, the question of contributory negligence could not arise.

Case referred to:-

(1) *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] A.C. 218 at p. 238.

FEDERAL COURT.

N. A. Marjoribanks for the appellants.

David Tay Seow Hai for the respondents.

Ong Hock Sim F.J. (delivering judgment of the Court): This is an appeal from the decision of the High Court at Kuala Lumpur awarding damages, special and general, with interest thereon, to the respondents, the widow and two infant sons of Lance Corporal Yong Wai Kee of the Royal Malaysian Air Force who died in a motor accident on May 3, 1970.